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**MetFab, Inc. and Sheet Metal Workers Local Union  
No. 54, AFL-CIO, affiliated with Sheet Metal  
Workers International Association**

**MetFab, Inc. and Sheet Metal Workers Local Union  
No. 54, AFL-CIO affiliated with Sheet Metal  
Workers International Association.** Cases 16-  
RM-763, 16-CA-23533, 16-CA-23603, and 16-  
CA-23672

January 31, 2005

**DECISION, ORDER, AND CERTIFICATION OF  
RESULTS OF ELECTION**

**BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER**

On September 30, 2004, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Charging Party Union filed exceptions and a supporting brief which consisted of the brief that it filed with the judge. The Respondent-Employer filed cross-exceptions and a supporting brief which also contained responses to some of the Union's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions,<sup>1</sup> the cross-exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.<sup>4</sup>

<sup>1</sup> No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1): by Supervisor Randy Davis' threat to employee Albert Davis that the Respondent might have to close its business if the Union won the election; by President Casey McGuire's announcement to employees during a power point presentation that he intended to implement improved employment benefits if employees voted against union representation; and by McGuire's statement to employee McCain which statement constituted both an interrogation as to how McCain would vote and created the impression that employees' union sympathies were being monitored.

No exceptions were filed to the judge's dismissal of complaint allegations that the Respondent violated Sec. 8(a)(1) by photographing union agent handbilling activity and by calling the police in an attempt to have handbillers arrested.

<sup>2</sup> The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

On the basis of a credibility resolution, the judge found that Gary Jones was discharged on January 30, 2004, rather than laid off, and, therefore, the challenge to his ballot should be sustained. In adopting the judge's finding, Member Schaumber does not rely on the judge's blanket statement in the "Statement of the Case" section of his decision

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, MetFab, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

**CERTIFICATION OF RESULTS OF ELECTION**

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Sheet Metal Workers Local Union No. 54, AFL-CIO, affiliated with Sheet Metal Workers International Association and that it is not the exclusive representative of the bargaining unit employees.

Dated, Washington, D.C. January 31, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

that his findings of fact were based in part on his "observation of the demeanor of the witnesses." See Member Schaumber's dissent in *Atlantic Veal & Lamb, Inc.*, 342 NLRB No. 37, slip op. at 4-5 (2004) (judge's blanket statement relying on observation of witness demeanor was insufficient to support credibility resolution absent an explanation of the demeanor-based indicia that influenced the judge). Rather, Member Schaumber notes that in making his credibility resolution concerning Jones, the judge did not rely solely on his blanket "observation of the demeanor" statement, but rather analyzed and balanced the witnesses' testimony and gave other reasons for the credibility resolution.

<sup>3</sup> In finding that Raymond Casillas was eligible to vote, the judge placed the burden of proof on the Respondent to show that Casillas, who worked the requisite number of days to be eligible to vote under *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Construction*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), the *Steiny/Daniel* formula, was nevertheless not entitled to vote. The Respondent argues that this burden placement is contrary to Board law, relying on *B. D. Kaplan & Co.*, 50 NLRB 1035, 1042 (1943), for the proposition that where employees are shown to have been laid off, to have been recalled, and to have failed to return without an explanation on their part for their failure to return, "it cannot be presumed that they nevertheless continued to be employees of the Company." Member Schaumber notes that *B. D. Kaplan*, supra, which has never been cited in any Board or court case, did not arise in the construction industry, an "industry characterized by intermittent employment." *Yellowstone Plumbing*, 286 NLRB 993, 1012 (1987).

<sup>4</sup> Member Liebman would not pass on the judge's dismissal of the 8(a)(1) allegation involving Supervisor Randy Davis' conversation with employee Albert Davis. The Union excepts to the dismissal, but the finding of a violation would be cumulative of an unexcepted to violation of Sec. 8(a)(1) found by the judge, involving a promise of benefit.

*Roberto Perez, Esq.*, for the General Counsel.  
*William H. Bruckner, Esq.*, for the Respondent/Petitioner.  
*Patrick M. Flynn, Esq.*, for the Charging Party Union.

### DECISION

#### STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. The petition in Case 16–RM–763 was filed by MetFab, Inc., the Employer/Respondent, on February 23, 2004.<sup>1</sup> Pursuant to a Stipulated Election Agreement, approved on March 2, an election by secret ballot was conducted among certain employees of MetFab, Inc. on March 26 to determine whether they desired to be represented for the purposes of collective bargaining by Sheet Metal Workers Local Union No. 54, AFL–CIO, affiliated with Sheet Metal Workers International Association (the Union).<sup>2</sup> The tally of ballots served upon the parties following the election disclosed the following results:

Approximate number of eligible voters	14
Void ballots	0
Votes cast for the Union	5
Votes cast against participating labor organization	6
Valid Votes counted	11
Challenged ballots	3
Valid votes plus challenged ballots	14

The challenged ballots were sufficient in number to affect the results of the election. On April 2, the Union and the Employer/Petitioner timely filed objections to the election. On the same date, the Union filed the unfair labor practice charge in Case 16–CA–23533 alleging, *inter alia*, conduct identical to that alleged in its objections. Additional charges were filed by the Union on May 3 and 28 in Cases 16–CA–23603 and 16–CA–23672, respectively.

Following an investigation conducted by the Board's Regional Director, an order directing hearing issued on June 30, finding that the challenged ballots, and the objections filed by both parties, raised substantial and material factual issues which may best be resolved on the basis of record testimony at a hearing. In the same order, which was amended on July 30, the Regional Director consolidated the challenge/objections hearing with a consolidated complaint and notice of hearing that issued the same date based upon the unfair labor practice charges filed by the Union. The consolidated complaint, which was amended on July 30, alleged that the Respondent, MetFab, Inc., violated Section 8(a)(1) of the Act. On July 9, the Respondent filed its answer to the consolidated complaint denying that it committed the unfair labor practices alleged. The Respondent amended its answer to respond to the amended complaint at the hearing.

The consolidated complaint, as amended, alleges that the Respondent violated Section 8(a)(1) of the Act in several respects,

<sup>1</sup> All dates are in 2004 unless otherwise indicated.

<sup>2</sup> The stipulated unit included all employees of MetFab, Inc., engaged in sheet metal fabrication and installation of sheet metal products working out of the employer's office in Houston, Texas, but excluding all other employees, including office and clerical employees, professional employees, guards and supervisors as defined by the Act.

before and after the election. Specifically, the General Counsel alleges that the Respondent, through shop foreman and admitted supervisor, Randy Davis, threatened employees on March 18 that the Respondent might have to close its doors if employees voted in favor of union representation and, on March 25, offered to grandfather employees into the Respondent's benefits package in order to induce them to vote against union representation. The complaint further alleges that the Respondent's president and admitted supervisor, S. Casey McGuire, offered employees improved benefits if they voted against union representation during a power point presentation to the employees on March 19, and created the impression of surveillance and interrogated employees during a one-on-one conversation with an employee at a client's facility on March 24. Finally, it is alleged that the Respondent engaged in surveillance of union activities on May 27 by photographing union representatives engaged in peaceful handbilling near the Respondent's facility, and on May 28, summoned law enforcement authorities in an attempt to cause the arrest of these union representatives.

Pursuant to notice, I heard these consolidated cases in Houston, Texas, on August 16 and 17. At the hearing, the Union withdrew its objections to the election and the parties stipulated that one of the challenged voters, Roger Reid, was not eligible to vote in the election. There remained for resolution the unfair labor practice allegations of the consolidated complaint, the Employer's objections, and the two challenged ballots. The General Counsel, the Respondent, and the Charging Party filed posthearing briefs on September 10.<sup>3</sup> In its brief, the Respondent withdrew its objections to the election, narrowing the issues even further. Having considered the evidence offered at the hearing, including my observation of the demeanor of the witnesses, and the arguments advanced by the parties at the hearing and in their briefs, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation, is engaged in the fabrication and production of specialty sheet metal products at its facility in Houston, Texas, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Texas. The Respondent admits and I find that it is

<sup>3</sup> On September 14, the General Counsel filed a motion to strike portions of the Respondent's brief. Specifically, the General Counsel sought to strike a footnote in which the Respondent asserted that the charge in Case 16–CA–23603 was invalid because it did not have a valid signature. The Respondent replied to this motion by letter dated September 16. Although the Respondent stated that it did not wish to waste my time or the client's money responding to the motion, it did not disavow the claims made in the footnote to its brief. Having considered the matter, I shall grant the General Counsel's motion on the basis that any claim that the charge is invalid has been waived by the Respondent's failure to object at the time the charge was introduced in evidence as part of the formal papers at the hearing or to otherwise raise this issue in a timely manner. Moreover, the point raised by the Respondent's footnote would fail on the merits for lack of legal authority for the proposition that an attorney's signature "by permission" is invalid under the Board's Rules and Regulations. Cf. *Ladies Garment Workers (Saturn & Sedran, Inc.)*, 136 NLRB 524, 527–530 (1962).

an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

McGuire, an engineer by training, founded the Respondent in the summer of 1999 as a custom sheet metal fabricator with clients primarily in the food processing industry. In addition to the shop employees who fabricate the sheet metal products, the Respondent employees field employees who install the products at customers' sites. Before establishing his own company, McGuire had worked for a union-signatory contractor in the same business. In 2000, after the Respondent was awarded a big contract at the Maxwell House coffee plant, McGuire contacted the Union because he needed workers for the job. After several meetings and telephone conversations with Carl Cox, the Union's business manager at the time who has since retired, McGuire became a signatory contractor himself. The agreement McGuire signed, on April 25, 2000, initially bound the Respondent to a multiemployer collective-bargaining agreement negotiated by the Union with the Houston Sheet Metal Contractors Association that was effective through March 31, 2001. That agreement was superseded by a new collective-bargaining agreement negotiated between the Union and the Association for the period April 1, 2001, to March 31, 2004. Although there was some testimony that the Respondent attempted to get out of the new agreement in 2001, there is no dispute that the Respondent complied with the terms of the 2001–2004 collective-bargaining agreement. There is also no dispute that the Respondent's contractual relationship with the Union was governed by Section 8(f), rather than Section 9(a) of the Act.

On October 16, 2003, McGuire sent a certified letter to the chairman of the Association, with a copy to the Union's new business manager, Doug McGee, who had succeeded Cox in January 2001, withdrawing the Respondent's authorization for the Association to act on the Respondent's behalf. On December 24, 2003, McGuire sent a letter to McGee, with a copy to the Association, notifying the Union of Respondent's intent not to renew the collective-bargaining agreement upon its expiration on March 31. Around the same time, McGuire held a meeting with the employees who were covered by the collective-bargaining agreement to advise them that the Respondent had decided to go in a different direction and not renew its contract with the Union. According to McGuire, he told the employees he wanted everyone to stay but he realized that, because of the amount of time many of them had in the Union, they might want to leave. McGuire asked the employees to give the Respondent notice before leaving. According to McGuire, he also told the employees that the Respondent would put in place a program of benefits to replace those under the union contract after it expired. Although he admittedly did not provide details of any new benefits, McGuire testified that he explained that the Respondent already had certain benefits for the office employees and would work off of those.

In early January, after the Union learned of the Respondent's intentions, McGee and Business Agent Stanley Bordovsky met

with McGuire and his stepbrother, Rex Davis, who is the Respondent's vice president. There is no dispute that the Union told McGuire that the Respondent could not simply walk away from the contract, that there was an interest arbitration clause in the agreement that bound the Respondent. It was after this meeting, according to McGuire, that he obtained legal counsel and filed the RM petition to resolve the question concerning the union representation of the Respondent's employees.

### B. Alleged Preelection Unfair Labor Practices

Albert G. Davis, no relation to Randy or Rex Davis, testified for the General Counsel regarding several allegations of the complaint. Albert Davis was employed by the Respondent in its shop from November 2003 until he was terminated in mid-May. He was unemployed at the time of the hearing. Albert Davis has been a union member since 1973 and is currently a journeyman. Albert Davis testified that, on March 18, he went into Randy Davis' office to get a work ticket. According to Albert Davis, this was a common practice for him as Randy Davis was the shop foreman who was responsible for assigning work. While in the office, the two men had a conversation. No one else was present. Albert Davis testified that, during this conversation, Randy Davis said he was not sure what the Company was going to do if they didn't get a nonunion vote, that they may have to shut their doors. Albert Davis did not respond to this comment and left the office. Albert Davis testified that he did not know what precipitated Randy Davis' comment about the election. As far as he could recall, nothing else was said about the election or the Union at that time. Albert Davis was unable to recall anything else that was said during this conversation. After he left Randy Davis' office, Albert Davis went to his bench and wrote down the conversation in a notebook.

Randy Davis testified for the Respondent. Although he did not have any official title, he was in charge of the shop. Randy Davis is Casey McGuire's stepbrother. He was no longer employed by the Respondent at the time of the hearing, having left the Respondent's employ in July to work for a company he and his wife owned. In response to leading questions from counsel, Randy Davis denied telling Albert Davis or any other employee that the Respondent would shut its doors if the Union won the election. Randy Davis did admit having a conversation with Albert Davis after McGuire's March 19 presentation, to be discussed later. He also admitted that he frequently talked to employees, including Albert Davis, about many things and conceded he could not say that he never discussed the Union with Albert Davis or any other employee. He simply could not recall talking about the Union with Albert Davis.

On cross-examination, the Respondent established that Albert Davis had been terminated by the Respondent for work performance and for urinating in the Company's parking lot. The parties stipulated that the Union filed a unfair labor practice charge over Albert Davis' termination and that the charge was withdrawn. There is no allegation that the termination violated the Act. During cross-examination regarding the circumstances of his termination, Albert Davis testified at one point that the only door from the shop to the office was locked on the day he allegedly urinated in the parking lot. On further ques-

tioning, Albert Davis acknowledged that there were other means of access to the bathroom in the office area. In addition, Gayle Davis, McGuire's mother and one of the Respondent's owners who works as the office manager, contradicted Albert Davis' testimony regarding the number of doors from the shop to the office and whether they were locked at any point.

The complaint alleges that the Respondent, during this conversation between Randy and Albert Davis, unlawfully threatened employees that the Respondent would close if they voted for the Union. Resolution of this allegation turns exclusively on credibility. The Respondent argues that I should not believe Albert Davis because he is a bitter man as a result of his termination by the Respondent. The Respondent also cites Albert Davis' testimony regarding access to the bathrooms in the office, which was contradicted by other evidence, as establishing his general lack of credibility. While Albert Davis' testimony that the only door from the shop to the office was locked may not be accurate, this does not prove he was lying about the conversation with Randy Davis. I note that Albert Davis first reported Randy Davis' alleged threat before there was any indication he would be fired and his testimony at the hearing is consistent with his earlier affidavit. Moreover, aside from his testimony about his termination, Albert Davis appeared to be a truthful witness. The Board has long recognized that a witness may be credible as to some but not all of his testimony. See, e.g., *Planned Bldg. Services*, 330 NLRB 791, 792 (2000). I also note that Randy Davis' denial that he made such a threat, elicited by leading questions, is undermined by his concession that he could not say with any confidence that he never discussed the Union or the election with Albert Davis. Although Randy Davis impressed me as a generally credible witness, it appears he may simply have forgotten he made such a comment to Albert Davis. This is particularly likely because of the off-hand manner in which the statement was made. The threat was not part of any orchestrated campaign to convince the employees to vote against the Union. Rather it seemed to be no more than Randy Davis' speculation as to the possible outcome of a union victory. Accordingly, I shall credit the testimony of Albert Davis and find that Randy Davis did state that the Respondent might close if the employees voted in favor of the Union.

The Board and the courts have frequently addressed the legality of statements such as the one at issue here. Although an employer may lawfully inform employees as to the precise effects he believes unionization will have on his company, such predictions "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based upon available facts but a threat of retaliation based on misrepresentation and coercion without the protection of the First Amendment." *NLRB v. Gissel Packing Co.*, 395 NLRB 575, 617 (1969). See also *NLRB v. St. Francis Healthcare Center*, 212 F.3d 945, 954-955 (6th Cir. 2000); *Times-Herald Record*, 334 NLRB 350 (2001); *Migali Industries*, 285 NLRB 820 (1987). Randy Davis' statement, without any explanation for his belief that the Respondent might have to shut its

doors if the union prevailed in the election, clearly meets the definition of a threat. Such a statement would have the reasonable tendency to convey the impression that the Respondent would rather go out of business than deal with the Union. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged, through Randy Davis' threat of closure of the business.

There is no dispute that, on March 19, McGuire conducted a power point presentation for the unit employees to describe the benefits that would be available after the expiration of the collective-bargaining agreement on March 31. Among the new benefits announced were paid vacations, 5 days after 1 year of service and 10 days after 5 years of service, and three paid holidays a year. The collective-bargaining agreement did not provide either paid vacations or holidays. McGuire also described the health insurance benefits that would be available, telling the employees that, unlike the Union's plan, which had different benefits for journeymen and apprentices, all employees would receive the same benefits. McGuire also told the employees they would receive dental benefits, something not available under the Union's contract. McGuire's presentation also included a larger life insurance policy, i.e., \$50,000 as opposed to the \$10,000 policy under the collective-bargaining agreement. Finally, McGuire talked about the retirement benefits the Company would have after the contract expired. Under the Respondent's plan, employees needed 1 year of service to be eligible but there was no vesting period. The plan, a simplified employee pension plan (SEP-IRA) was fully funded through employer contributions with withdrawals permitted at any time. According to employees who were at the meeting, McGuire compared this plan to the Union's pension, telling the employees that the Union's plan was in bad shape. McGuire told employees if they wanted to see for themselves the poor financial shape that the Union's plan was in, they could go into Randy Davis office and he would bring it up on the computer for them. McGuire told the employees that the Respondent's plan would do better for the employees and would be more cost effective.

McGuire admitted making most of the statements attributed to him by the General Counsel's witnesses. According to McGuire, he gave this presentation in response to questions that had been raised by the employees about what would happen after the contract expired. McGuire testified that he did not mention the upcoming election and did not tell the employees that, if the Union won the election, he would have to negotiate with the Union about these benefits. In a pretrial affidavit, McGuire had stated that he told the employees these were the benefits they would receive regardless of the outcome of the election. There is no dispute that some of the new benefits were not as good as those provided under the union contract. For example, McGuire's presentation reveals that employees would not be eligible for overtime until after they had worked 40 hours in a week, as opposed to the contractual requirement of overtime after 8 hours per day. Similarly, the Respondent's new health insurance plan included employee contributions, which were not required under the collective-bargaining agreement.

The complaint alleges that the Respondent, through McGuire's presentation, unlawfully promised employees improved

benefits if they voted against union representation. The facts supporting this allegation are undisputed. McGuire admittedly told the employees at this meeting that, after the contract expired, they would receive benefits such as paid vacations and holidays and a dental plan that they did not then receive, and that they would receive improved health insurance, life insurance, and a better retirement plan than they received through the Union. Although the Respondent's proposed overtime policies would not be as good as the contract's provisions, overall the plan presented was better for the employees. The Respondent argues that McGuire's presentation was not an unlawful promise of benefits. In the Respondent's view of the facts, McGuire was simply advising the employees of the benefits that it would implement when the 8(f) contract with the Union expired, which it had a right to do under *John Deklewa & Sons*, 282 NLRB 1375 (1987).

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), the Supreme Court recognized the inherent danger in well-timed increases in wages and benefits and found that a grant of benefits intended to influence employees' choice in an election violates Section 8(a)(1) of the Act. Although the grant of benefits during an election campaign is not per se unlawful, the Board will draw an inference of improper motivation and interference with employee free choice where the evidence shows that employees would reasonably view the grant of benefit as an attempt to interfere with or coerce them in their choice of representative. An employer may rebut this inference with proof of a legitimate business reason for the timing and grant of the benefit. *Southgate Village, Inc.*, 319 NLRB 916 (1995); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), *enfd.* 48 F.3d 1362 (4th Cir. 1995), *affd.* 517 U.S. 392 (1996). More recently, the Board held that the timing of an employer's announcement of wage increases during a union campaign may be unlawful even if the wage increase itself does not violate the Act. *Mercy Southwest Hospital*, 338 NLRB 545 (2002), and cases cited therein.

Applying the law to the facts here, I find that the Respondent's March 19 announcement of its new benefit program was unlawful, as alleged in the complaint. Even assuming that the Respondent had the right under *Deklewa*, *supra*, to terminate the collective-bargaining agreement and implement new wages and benefits upon its expiration, the timing of the announcement, shortly before employees were to vote on whether to continue union representation, supports an inference that the Respondent intended to influence employee choice in that election. Because the new benefits would only go into effect after the contract expired if there were no union on the scene, the message conveyed by the Respondent was that employees could not receive these new benefits if they voted for continued union representation. Moreover, the Respondent offered no evidence that it had decided upon the new benefit program before it filed the petition which precipitated the election. The conclusion is inescapable that, having initiated the process to remove the union as its employees' bargaining representative, the Respondent wanted to ensure a favorable outcome by conveying to the employees the benefits they would receive once the Union was gone and the collective-bargaining agreement had terminated.

There is no dispute that, on March 25, the day before the election, Randy Davis called Albert Davis into his office and talked to him about the new benefits. According to Albert Davis, Randy Davis said he realized that Albert had not been with the Company for a year. Randy Davis then asked, if Albert Davis could be grandfathered into the program, would that affect his vote. Albert Davis said it would not and the conversation ended. Albert Davis could not recall anything else that was said in this conversation. On cross-examination, Albert Davis conceded that Randy Davis may have talked about Albert Davis staying on with the Company after the election. Albert Davis also acknowledged that Randy Davis asked him if he would stay on if the Respondent grandfathered him for the new benefits.

Randy Davis testified that he spoke to Albert Davis because he observed at the March 19 meeting that Albert Davis and another employee who had been with the Company less than a year seemed disappointed that they wouldn't be eligible for the pension plan because they had not been there a year. According to Randy Davis, he asked Albert Davis, "[I]f I was able to convince Casey to grandfather those guys who hadn't been working there a year would he consider staying, or would that affect his decision to stay?" Randy Davis recalled that Albert said it would not affect his decision. Randy Davis denied asking Albert if it would affect or sway his vote in the election. According to Randy Davis, he figured the Respondent had enough votes to win the election and he was concerned that all the long-term union members would quit immediately after the election. Randy Davis testified that he considered Albert Davis a good worker and he was trying to convince him to continue with the Company after the election. Randy Davis also testified that he had not been authorized to have this conversation with Albert Davis and that Casey McGuire reprimanded him for having done this. Randy Davis conceded that Albert Davis had given him no indication before this conversation that he planned to leave after the election. There is no dispute that the Respondent had asked Albert Davis to be its observer at the election before this conversation but that he was told afterward that he would not be the observer.

The complaint alleges that the Respondent, through Randy Davis, made an unlawful promise of benefits when Randy Davis offered to grandfather Albert Davis so he could receive the new benefits offered at the March 19 meeting. There is no dispute that Randy Davis called Albert Davis into his office for the purpose of making such a proposal. The only issue is whether Randy Davis offered to grandfather Albert Davis in order to win his vote in the election, or to induce him to remain with the Respondent after the election. Although Albert Davis initially testified that Randy Davis asked if the grandfathering would affect his vote in the election, he conceded on cross-examination that Randy Davis asked if it would affect his decision to stay with the Company. Albert Davis testimony on cross-examination thus corroborates Randy Davis version of the conversation. This version of the facts is also consistent with other evidence in the record showing that the Respondent was confident that a majority of the employees would vote against union representation and that its main concern, in the days preceding the election, was that a number of long-term

union members would quit en masse, leaving the Respondent unable to complete its contracts with customers. Accordingly, I shall credit Randy Davis as to this allegation and find that Randy Davis made the offer to grandfather Albert Davis in order to encourage him to stay with the Company after the election. Such an offer, not tied to how Albert Davis voted in the election, did not amount to an unlawful promise of benefit under the Act. Accordingly, I shall recommend dismissal of this allegation of the complaint.

Brandon McCain, who worked for the Respondent for about 3 years until he left to work for another union-signatory contractor on April 8, also testified for the General Counsel regarding the 8(a)(1) allegations. McCain was an apprentice who worked in the field under the Respondent's contract with Maxwell House. He testified that, on March 24, 2 days before the election, McGuire visited the Maxwell House plant and asked to speak to him. According to McCain, McGuire talked about the upcoming NLRB election, telling McCain that he already had 6 out of the 11 people voting and that he would also like McCain to stay with him. McCain responded by telling McGuire that he didn't think this was anything more than a last-ditch attempt to win his vote. McGuire denied this was the case. McCain ended the conversation by returning to work. McCain testified that no one else was present during this conversation with McGuire. On cross-examination, McCain denied that McGuire had repeatedly asked him to stay after the union vote. According to McCain, this was the only time McGuire asked him to stay with the Company.

McGuire admitted having a conversation with McCain at Maxwell House before the election and admitted telling McCain that he thought the vote would be 6-5. McGuire also admitted telling McCain that he would like his vote. According to McGuire, he knew how the vote would go because the Respondent had hired most of the employees, including McCain, and had sent them to the Union to join. On cross-examination, McGuire testified that he personally liked McCain and wanted him to stay with the company and that was why he spoke to him that day. McGuire denied that he went to Maxwell House to speak to McCain about the election. According to McGuire, he was at the site looking over the job, something he does several times a week.

McGuire essentially admitted making the statements attributed to him by McCain, who impressed me as a credible witness in any event. The complaint alleges that McGuire violated the Act in two respects during his conversation with McCain at the Maxwell House job. McGuire's prediction as to the outcome of the election allegedly created the impression that the employees' union activities were under surveillance by the Respondent. This prediction, together with McGuire's request for McCain's vote, is further alleged as a form of interrogation because the conversation invited the employee to reveal his sympathies for the upcoming election.

The Board will find that an employer has created the impression of surveillance when its statements or actions would lead employees to reasonably assume that their Section 7 activities have been placed under surveillance. *Fred'k Wallace & Son*, 331 NLRB 914 (2000); *Tres Estrellas de Oro*, 329 NLRB 50 (1999); *United Charter Service*, 306 NLRB 150 (1992). Here,

McGuire's statement that he knew how the election would turn out, down to the precise number of employees who would vote against the Union, would lead an employee to assume that the Respondent was monitoring the union sympathies of its individual employees. It is irrelevant that McGuire reached his conclusion by lawful means rather than through actual surveillance because it is the impression conveyed to the employee that violates the Act. See *Martech MDI*, 331 NLRB 487 fn. 4 (2000). Accordingly, I find that the Respondent, through McGuire, violated the Act as alleged by creating the impression of surveillance on March 24.

The Board has held that statements not "couched as questions" may nonetheless constitute unlawful interrogation when they are "calculated to elicit responses from [employees] about their union sentiments." *Westwood Health Care Center*, 330 NLRB 935, 941 fn. 21 (2000), quoting from *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 929 (5th Cir. 1993). See also *Clinton Electronics Corp.*, 332 NLRB 479 (2000). McGuire's statement here, that he knew that 6 out of 11 employees would vote against the Union and that he would like McCain's vote as well, would compel a response from an ordinary employee that would reveal his union sympathies. I find that McGuire's conversation here meets the totality of circumstances test used by the Board to evaluate allegations of unlawful interrogation. *Westwood Health Care Center*, supra; *Rossmore House*, 269 NLRB 1176 (1984). McGuire was the Respondent's highest-ranking officer. He sought out McCain at his job site to speak to him one-on-one. The alleged interrogation occurred in the same conversation in which McGuire created the impression of surveillance and less than a week after he had promised employees improved benefits if they voted against union representation. Finally, the interrogation was couched as a request that McCain "stay with the company" by casting his vote against the Union. All of these circumstances convince me that the effect of McGuire's conversation was coercive within the meaning of the Act.<sup>4</sup> Accordingly, I find, as alleged in the complaint, that the Respondent violated Section 8(a)(1) of the Act on March 24 when McGuire interrogated McCain at the Maxwell House jobsite.

### C. Postelection Allegations

There is no dispute that the Union engaged in handbilling at the Respondent's shop on Allen Genoa Road in Houston on May 27 and 28. Union organizer Billy Kenyon testified that he was accompanied by three apprentices who were members of the Union participating in an educational program. None had ever been employed by the Respondent. Kenyon was also accompanied by a 16-foot high inflatable rat with a sign bearing the Respondent's name on its chest. The Union had used this device to protest other employers with whom it had a dispute and had also displayed the rat bearing the Respondent's name at the Maxwell House facility and at the locations of other customers of the Respondent before May 27. There is no dispute that the rat was located on the property of a church across the

<sup>4</sup> Whether McCain was actually coerced into revealing his union sympathies is irrelevant as the Board's test is an objective one. See *NLRB v. McCullough Environmental Services*, 5 F.3d at 927.

street from one of the Respondent's gates. Kenyon testified that he and the apprentices handbilled at the Respondent's facility from approximately 7 a.m. until 3 p.m. on both days. He testified that they did not block entrance to or egress from the facility, did not impede traffic on the street or sidewalk, and engaged in no other activity that would violate any laws. The Respondent did not dispute this testimony other than to claim that, for part of the day on May 28, the Union set up lawn chairs and an umbrella on the sidewalk impeding pedestrian traffic. The parties stipulated that, on May 27, the Respondent's attorney photographed Kenyon and the others as they handbilled.

The complaint alleges that the Respondent's photographing of Kenyon and the other union handbillers on May 27 amounted to unlawful surveillance. The Respondent counters that the mere act of photographing union representatives is not unlawful where no employees were present or even aware of pictures being taken. The Board, in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), set forth the fundamental principals governing employer surveillance of protected concerted activities. Where employees are conducting their activities openly on or near the employer's premises, open observation of such activities is not unlawful. *Roadway Package System*, 302 NLRB 961 (1991), and cases cited therein. Where an employer's surveillance activities go beyond "mere observation," the Board will find a violation. In *F. W. Woolworth*, supra, the Board found that photographing or videotaping employees engaged in such activity goes beyond "mere observation" and is unlawful because such pictorial record keeping tends to create fear among employees of further reprisals. Accord: *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Here, there is no evidence that any employees participated in, or were present, when the Respondent's attorney took photographs of the union activity outside its gates. In the absence of such evidence, it is difficult to conclude that any employees were restrained or coerced in the exercise of Section 7 rights.<sup>5</sup> Accordingly, I find that the conduct of the Respondent's attorney on May 27 did not violate Section 8(a)(1) of the Act and I shall recommend that this allegation of the complaint be dismissed.

It is undisputed that, on May 28, the Respondent summoned the Houston police to the site to investigate whether the Union's handbillers were violating any laws. Officer Joseph C. Cram, from the criminal intelligence division of the Houston police department, testified that he first spoke to Kenyon and inquired as to the Union's plans. He then determined that the rat was not on public property and that the Union had permission of the Church to place it where it was. Cram then went into the Respondent's office and spoke to Rex Davis. According to Cram, Rex Davis was upset and complained that the demonstrators were blocking the sidewalk and forcing neighborhood children to walk in the street to get around them. Rex Davis also complained that the rat's arm was hanging in the street

causing a traffic hazard. Cram told Rex Davis that he had already talked to the union demonstrators and had them move the rat so it did not hang in the street and that he had reminded them of the rules against blocking the sidewalk. After meeting with Rex Davis, Cram returned to the sidewalk and talked to Kenyon again. Cram did tell Kenyon to move the chairs and umbrella so as not to impede the sidewalk and he reminded them of the rules. Cram testified that he did not observe the union representatives violating any laws or public ordinances while he was there. The incident report he filed is consistent with this testimony. Rex Davis was not called as a witness in this proceeding.

The complaint alleges that the Respondent violated the Act when Davis called the police in an attempt to have the union handbillers arrested. The General Counsel argues that, because the union representatives were on public property and not violating any laws during the handbilling, it was unlawful for the Respondent to call the police. The Respondent counters that the Respondent simply called the police to investigate whether or not the union representatives were blocking the public sidewalk or interfering with traffic by the placement of the rat. The Respondent notes that there is no direct evidence that any official of the Respondent requested that Officer Cram arrest the union handbillers.<sup>6</sup> The Respondent also points out the lack of evidence that any employees were aware of this incident.

The Board has held that an employer may not prohibit a union from engaging in peaceful picketing or handbilling on public property and may not cause or attempt to cause the arrest of individuals engaged in such activities. See *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000), and cases cited therein. The evidence here does not support a finding that the Respondent in fact attempted to evict the Union from public property or to cause their arrest. At most, the Respondent called the police to investigate whether the Union was encroaching on private property or impeding traffic, which it had a right to do. Officer Cram acknowledged that he had to advise Kenyon to move the rat, the lawn chairs, and umbrella because they were encroaching on the public right of way. Officer Cram also testified that it is part of his duties to monitor labor disputes and he was aware of the handbilling at the Respondent's premises even before receiving the call to investigate the Respondent's complaint. In the absence of evidence that the Respondent attempted to cause the arrest of Kenyon or anyone else, I cannot find that the Respondent's action on May 28 rose to the level of an unfair labor practice. Accordingly, I shall recommend that this complaint allegation be dismissed.

### III THE CHALLENGED BALLOTS

As noted above, the tally of ballots cast in the March 26 election was 6-5 against the Union with 3 determinative challenged

<sup>5</sup> The three individuals who were with Kenyon at the time were not employees. They were union apprentices on leave to participate in an educational program in which young members of the Union learned about the Union and assisted in organizing.

<sup>6</sup> Kenyon's hearsay testimony that Officer Cram told him that the Respondent wanted the handbillers arrested was uncorroborated. Officer Cram did not testify to any such request and nothing in the police report indicates that a request was made to arrest anyone.

ballots. The challenged ballots were cast by Roger Reid, Raymond Casillas, and Gary Jones. All three voters were challenged by the Board agent conducting the election because their names were not on the eligibility list supplied by the Respondent. Because the parties have stipulated that Reid was not eligible to vote in the election, I shall sustain the challenge to his ballot. The remaining two challenged ballots are still sufficient in number to affect the results of the election. Resolution of these challenges turns on whether Casillas and Jones were eligible to vote in the election by virtue of prior employment with the Respondent under the formula used by the Board to determine eligibility in the construction industry. See *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Construction*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967). The parties had agreed, in the Stipulated Election Agreement, that the *Steiny/Daniel* formula would apply to determine eligibility in this election.

The *Steiny/Daniel* formula provides that, in addition to those eligible to vote under the Board's standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. Employees who had been terminated for cause or quit voluntarily prior to completion of the last job for which they were employed would not be eligible under this formula. The Board uses such a formula to ensure that employees who may have an interest in the outcome of the election are not disenfranchised because of the short-term, intermittent, and sporadic nature of employment in the construction industry. In *Steiny*, supra, the Board decided that this formula would apply in all construction industry elections regardless of the particular employer's method of operations.

The parties here have stipulated that Casillas and Jones worked the requisite number of days to be eligible to vote in this election under the *Steiny/Daniel* formula. The Employer contends, however, that Casillas was not eligible because he declined an offer of recall and that Jones was not eligible because he had been terminated during his last period of employment. Because the Employer conceded that Casillas and Jones satisfied the numerical criteria of the formula and because the Employer was in possession of the evidence that would resolve the issue raised by these challenges, I placed the burden of proof on the Respondent to show that these otherwise eligible voters were not entitled to vote.

The parties stipulated that Casillas was laid off on September 24, 2003, and that, on November 18, 2003, after the Employer had inquired through the union hiring hall whether he was available, he declined recall because he had other employment. There is no evidence that the Respondent has attempted to recall Casillas since that date. Nor is there any evidence in the record whether Casillas was employed elsewhere at the time of the election.<sup>7</sup> McGuire testified that the Respondent's "policy"

<sup>7</sup> The parties also stipulated that Casillas has been a part-time welding instructor in the jointly administered apprentice training program since 1998, working approximately 16 hours a month. This would not affect his eligibility under the *Steiny/Daniel* formula.

is that, if an employee refuses recall, the Respondent would not "typically" go back to him again. McGuire testified that he didn't think there were any instances where the Respondent had offered employment to someone who had declined recall. McGuire conceded on cross-examination that the Respondent had no formal policy regarding this matter. Other evidence in the record indicates that it is Rex Davis, not McGuire, who is responsible for hiring employees. As previously noted, Rex Davis did not testify in this proceeding.

I find that Casillas retained his eligibility to vote in the election notwithstanding the fact he declined an offer of recall in November 2003. There is nothing in the Board's decisions in *Steiny* or *Daniel Construction* that expressly holds that an employee who has worked the requisite amount of time for an employer loses eligibility by declining recall. The only specific exceptions noted are for an employee who has voluntarily quit or been terminated for cause prior to the completion of the last job on which he worked. Neither is the case with Casillas. The Respondent has not cited any cases applying the formula where the Board has disqualified a voter on this basis.<sup>8</sup> Moreover, the nature of employment in the construction industry, which led the Board to adopt an eligibility formula in the first place, supports a finding of continuing eligibility even after a recall offer has been declined. Because construction employees may work for different employers at different times, it would not be uncommon for an employee to be working elsewhere when an opening with the employer came up. It would also not be unusual for this employee to work for the same employer again after his current employment ended. Particularly where hiring is done through a hiring hall, with employees' names going on and off the out of work list, an employee's unavailability at one point in time would not extinguish his expectation of future recall by the same employer were he to become available in the future at a time when the employer needed workers.

The Respondent attempted to show that it had a policy of not offering employment to an employee who has declined recall. Even assuming that such a policy would terminate a laid off employee's eligibility under *Steiny/Daniels*, the Respondent has not proved the existence of such a policy. McGuire admitted that the Respondent had no "formal policy." He testified, essentially, that he didn't think the Respondent would attempt to recall an employee who had previously declined an offer of recall. McGuire conceded he could not think of any instance where this had occurred. Moreover, McGuire may not have been the best witness to testify regarding the Respondent's hiring policies since he testified that it was his stepbrother, Rex Davis, who handled such personnel matters. Rex Davis was not called as a witness. Gayle Davis, who as the office manager would presumably also be aware of the Respondent's policies because she maintained the records and completed any paperwork required, was not asked any questions about this "policy." I find that the Respondent has not offered sufficient evidence to show that Casillas was no longer eligible to vote on the date of

<sup>8</sup> The cases cited by the Respondent involved the eligibility of employees who had retired, thus severing their employment relationship. See *Columbia Steel Casting Co.*, 288 NLRB 306 (1988); *Belt Supermarket*, 260 NLRB 118 (1982).



the election. Accordingly, I shall overrule the challenge to his ballot.

McGuire testified that Gary Jones was fired on January 30 after he left work early, telling Randy Davis that he was going home to take a nap. According to McGuire, he became aware of the situation when he overheard Randy telling Rex Davis about it. McGuire testified that he came out of his office and told Randy Davis, "[T]hat man's fired." McGuire testified further that he made the decision to fire Jones because the Respondent was very busy that week and could not tolerate people leaving work in the middle of the day. McGuire recalled that this incident occurred at approximately 2 p.m. McGuire instructed Randy Davis to get Jones' time so he could prepare his check. The following Monday morning, when Jones reported to work, Randy Davis informed him he was fired and gave him his final check and a separate check for 2 hours show-p pay under the collective-bargaining agreement. McGuire admitted that no attempt was made to contact Jones before Monday morning to tell him he was terminated, which would have avoided having to pay him for showing up Monday morning. Randy Davis also testified about Jones' termination. According to Randy Davis, Jones walked into the office around 1:30 or 2 p.m. and said he was real tired and was "fixing to go home and take a nap."<sup>9</sup> Randy Davis told Jones that the Respondent was real busy and asked, "[W]hat do you mean you're going home and take a nap?" Jones replied, "Hey, I'm out of here. I'll see you Monday." According to Randy Davis, Jones left before he could stop him. Davis testified that he turned to McGuire and said, "[D]id you hear that?" and McGuire said, "[T]hat man's fired, let's get his money." The following Monday, when Jones came into work, Davis told him, "I hate to have to say this, but it's time for us to part company. I've got your two-hour show-up time check and your final paycheck." Randy Davis could not recall whether anyone was hired to replace Jones after he was fired. The Respondent offered no payroll or other records to show that he was replaced. The Respondent's witnesses conceded that, on documents submitted to the Texas Work Force Commission in response to Jones application for unemployment benefits, the Respondent indicated "permanent layoff" rather than "fired" as the reason Jones was no longer employed.<sup>10</sup> Gayle Davis, who completed this form testified that she checked that box because no one was around at the time and she did not know the circumstances of Jones' termination. McGuire testified that he did not see this form until after it had been submitted to the Work Force Commission.

Gary Jones was called as a witness by the Union. He did not dispute the testimony that he left work early on his last day of work to go home and take a nap. According to Jones, he was tired because he had not been getting much sleep since putting his mother in an assisted living center. Jones testified that he left after completing the project he had been working on and that, when he told Randy Davis he was leaving, Davis simply

asked him if he would be in on Monday. When Jones told Davis he would, Davis said, "See you Monday." Jones testified further that, when he reported for work on Monday, Randy Davis handed him his papers and said things were slowing down and he had to let him go. According to Jones, Davis even asked if he would come back if the Respondent got more work. Jones said he would. There is no dispute that Jones received unemployment benefits. Jones disputed the testimony of the Respondent's witnesses that the shop was busy at the time of his layoff. The Respondent's payroll records show that Jones left work about 1-hour early on Friday.

The Respondent contends that Jones was not eligible to vote under the express exception to the *Steiny/Daniel* formula for employees who have been terminated for cause prior to the completion of their last job. Although there is no dispute that Jones left work early on January 30 to go home and take a nap and that his employment ended almost immediately thereafter, there is a dispute whether the Respondent fired him for leaving early or simply laid him off. The Respondent's witnesses testified that he was fired. As noted by the Union, the testimony of Randy Davis and McGuire is not entirely consistent regarding the sequence of events that Friday afternoon. Also, as noted by the Union, their testimony is contradicted by the only written document in evidence, which states that Jones was laid off, not fired. This document would seem to support Jones' testimony that he was laid off because work was slow. Jones testified further that Randy Davis even asked if he would come back to work when things picked up. The fact that the Respondent did not hire a replacement for Jones also undermines the testimony of McGuire and Randy Davis that the Respondent had a lot of work to do when Jones walked off the job. Notwithstanding the conflicting evidence and apparent inconsistencies in the Respondent's case, I find that Jones was terminated for cause and thus not eligible to vote in the March 26 election.

I reach my conclusion after careful consideration because it is more probable than not that the Respondent would have fired an individual who decided unilaterally that he was going home to take a nap. Regardless of his reasons for doing this, an employee who walks off the job can hardly be surprised when he finds himself unemployed the next day. Moreover, had the Respondent decided to lay off Jones for lack of work, they would probably have done so on Friday afternoon, before he left for his nap, rather than make him come in on Monday and have to pay him an extra 2 hours pay. A layoff for lack of work generally is planned in advance and not a spur of the moment decision. The fact that the paperwork submitted in response to Jones' unemployment claim characterized the termination as a layoff is also not surprising. As Gayle Davis testified, Jones had not worked for the Respondent long enough for his unemployment claim to be charged against the Respondent. It is also not unusual in the construction industry for an employer to give an employee a layoff even where the termination is for cause. Finally, I note that the slight variations in the recollection of events by Randy Davis and McGuire are not fatal to their credibility. Any differences are more than likely attributable to the passage of time and the individual perspective of the witnesses than an attempt to fabricate evidence. In this regard, Randy Davis would have no reason to perjure himself in this pro-

<sup>9</sup> On further questioning, Davis said this conversation occurred in the hallway between the break room and the office, within earshot of Rex Davis' and McGuire's offices.

<sup>10</sup> This is the same box that was checked on the form submitted in response to Casillas unemployment claim.

proceeding since he no longer works for the Respondent. On the other hand, Jones, who was unemployed for some time after his termination, secured employment through the Union after voting in the election. His allegiance to the Union may have colored his recollection of events.

Based on the above, I find that Jones was not eligible to vote in the election and that the challenge to his ballot should be sustained. Because the ballot of Casillas is no longer determinative of the outcome of the election, I shall recommend that a Certification of the Results of the Election issue confirming that a majority of the valid votes counted were cast against the Union.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees that the Respondent would shut its doors if they voted in favor of the Union, by offering employees improved benefits to encourage them to vote against the Union, by creating the impression among employees that their union activities were under surveillance, and by interrogating employees regarding their union sympathies, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. The Respondent did not engage in any other unfair labor practices as alleged in the complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In order to remedy the 8(a)(1) violations found, I shall recommend that the Respondent post a notice to employees. Although the Respondent committed unfair labor practices during the critical period before the election in Case 16-RM-763, I shall not recommend that the election be set aside because the Union has withdrawn its objections to the election. Accordingly, I shall recommend that a Certification of Results issue in Case 16-RM-763.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

#### ORDER

The Respondent, MetFab, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it will shut its doors if they vote in favor of representation by Sheet Metal Workers Local Union No. 54, AFL-CIO, affiliated with Sheet Metal Workers International Association, or any other labor organization.

<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Offering employees benefit improvements if they vote against union representation.

(c) Making statements that create the impression among employees that their union activities are under surveillance.

(d) Coercively interrogating any employee about union support or union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 18, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER RECOMMENDED that the challenges to the ballots of Gary Jones and Roger Reid be sustained and that a Certification of the Results of the Election issue in Case 16-RM-763.

Dated, Washington, D.C. September 30, 2004

#### APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to shut our doors if you vote in favor of union representation.

WE WILL NOT offer you benefit improvements if you vote against union representation .

WE WILL NOT make statements that create the impression that we are keeping your union activities under surveillance.

WE WILL NOT coercively question you about union support or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

METFAB, INC.